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STATEMENT OF DERRELL COHOON
TO THE U.S. SENATE COMMITTEE ON HOMELAND SECURITY
SUBCOMMITTEE ON FEDERAL FINANCIAL MANAGEMENT, GOVERNMENT
INFORMATION, AND INTERNATIONAL SECURITY

ADDRESSING THE ISSUE OF DEBRIS REMOVAL CONTRACTS

Mr. Chairman, members of the Subcommittee, members of our Louisiana delegation, welcome, and thank you for your continued interest and help. My name is Derrell Cohoon. I'm CEO of the Louisiana Associated General Contractors, and I'm pleased to be able to testify on our construction industry's experience with respect to the debris removal issue.

Hurricane Katrina, its aftermath throughout southeast Louisiana and the Gulf Coast; and failure of the levee system in New Orleans and St. Bernard and Plaquemines Parishes; and later, Hurricane Rita which devastated much of southwest Louisiana – spelled a natural disaster of which the country hasn't seen in recent history. We now live in what we have termed "the new normal." Entire parishes with unstable tax bases due to disruption of businesses, entire communities displaced, hospital systems destroyed, and for a construction industry that was participating in a very viable economy prior to the storms, struggles to maintain their businesses, workforces, payments on equipment, and cash flow while we wait for the opportunity to participate in the rebuilding the what amounted to a third of the state's economic base.

For your information, Louisiana Associated General Contractors is a construction trade association representing 700 hundred firms across Louisiana – general construction firms in the fields of commercial, highway, and heavy construction, as well as subcontracting and supply firms, very accustomed to have to compete for work in the public sector through an open, and competitive public bidding system. Louisiana AGC is a chapter of the AGC of America, based in Washington, DC, since 1918, with a country-wide membership of 32,000 firms. LAGC has been a stable organization representing the interests of the construction industry in Louisiana since 1949.

Many of the firms we represent are based in southeast and southwest Louisiana. In just days after both devastating hurricanes, however, practically every one of the construction firms were in contact with my office. We were able to communicate with the membership in other areas of the state, and identify their resources in assisting. We even located vacant space in offices, warehouses, and construction yards from Baton Rouge to Shreveport, to relocate firms on a temporary basis. Many of the firms we represent, understandably, were left with delayed or cancelled contracts. Yet they still had equipment payments to meet, payrolls to maintain, and certainly, need for cash flow to be able to later assist in what will be a massive effort to rebuild what many had participated in built. They needed work, and needed it immediately. Debris removal and demolition was something they needed to participate in, and soon.

We quickly identified seventy firms willing and able to participate in debris clean-up. After ascertaining that we were in FEMA Region VI, I contacted them to let them know of our availability, and asked for a meeting. They couldn't seem to understand that LAGC wasn't a "contractor". After three days of no contact, I finally attempted an e-mail, only to learn that there was none for Region VI on their website, and the Washington e-mail address wasn't functioning.

Later we learned of the \$500 million, “primary” contracts with the multi-national firms. We made personal contact whenever possible, but often were required to push our members onto the “primary” contractors’ websites to “register”, which we did. In the meantime, it quickly became apparent that the 1st, 2nd, 3rd, and down to 4th tier subcontracts were already in effect, and Louisiana firms were being relegated to 5th, 6th, and lower tiers.

Many have raised issue with the process under which contracts have been awarded, and the utilization of construction companies based in the disaster areas, for disaster clean up, demolition, FEMA trailer housing construction, and “blue roofs’ program in Louisiana. Needless to say, the devastation wrought by Katrina and Rita was unparalleled, and the work required to restore the southeast and southwest portions of Louisiana is such that it would require help from both inside the state and outside. However, the Stafford Act requires utilization of firms from the disaster areas wherever possible, so that those firms may survive the initial devastation on the local and state’s economy, and their own businesses.

While there have been opportunities for some Louisiana firms to participate as subcontractors, others have not, either because they couldn’t afford to take the work at prices demanded of them by the primary contractors or their higher-tiered subcontractors, or they were never afforded the opportunity for work at all. We’ve been told by Corps representatives that they consider anyone licensed by the state of Louisiana, pre or post-Katrina/Rita as a resident, which should skew any statistics from the primary contractors of Louisiana firm participation, for purposes of fulfilling the requirements of the Stafford Act.

The reality for most of the construction industry in Louisiana is that few were in a position to secure the major, or “primary” \$500 million contracts, even pre-Katrina/Rita, anyway. Those

contracts were too large. We learned later that most of the contracts were executed pre-storm, or were given out as no-bid contracts without the use of true public, cost-effective, bidding, and are of such a high dollar volume that most firms don't have the resources to participate. That left most in the industry in Louisiana in the position of having to go into the websites of the "primary" contractors, and register, which proved to be a very frustrating, time-consuming, and inefficient experience to say the least. Many also eventually made direct contact. However, because few were fortunate enough to have had a prior relationship with one or more of the primary, out-of-state contractors, they were unable to secure first, second, or even third tier status. As the tiers became lower, as each subcontractor then subcontracted work to a lower tier, the amount of possible return was further reduced, sometimes dramatically.

Please keep in mind that the \$500 million contracts were not contracts with a \$500 million guaranteed maximum price. Rather the \$500 million was a ceiling for the budget set by FEMA/ Corps of Engineers. Once the primary contractor reaches the ceiling, his contract ends. So the contractor is encouraged to reach the ceiling, which may entail building in of additional management layers, or "bells and whistles" to reach it.

To be more specific, there is a system of vertical tiered subcontracts that has been created by the primary contractors, and it appears that as the vertical tier descends, the prices demanded by upper tiered subcontractors is also much less – in some instances we've heard, a difference between \$23 a cubic yard hauled at the primary contractor level, to a low of \$6 a yard in the lower tiers. We have been told that some go so low as \$3. Some of the tiers performed little actual work, but merely brokered work downwards.

Back to the vertical tier subcontracts. The press has begun to collectively term the vertical nature of the contract structure as "5th tier subcontractors". A primary contractor contracts with a sub to

provide debris removal. Then the subcontractor, in turn, subcontracts for debris removal, and his sub contracts with another sub for debris removal, and on and on. The tiers are vertical in nature, and all, at least on paper, perform the same function as the first tier. This process allows for costs to be driven up, ineffective management by the Prime, decreased productivity, the possibility of some sub-contractors performing no “real” work at all and only acting as a pass-through, and slow payment as bills pass down through multiple layers of subcontractors. Compounding the problem is that there are no protections for lower-tiered subcontractors against non-payment for the work they have performed.

There have been many complaints about subcontractors not being paid in a timely manner. Though all of the work is bonded through performance bonds held by FEMA or the Corps against the primary contractors, the work is governed by the federal Miller Act. The Miller Act prohibits a subcontractor, supplier, or laborer, who has not been paid from placing a lien on the work for payment for work performed. While the bond is designed to insure payment, the Miller Act appears to only provide for payments to the first two tiers of subcontractors.

With regard to the FEMA/Corp contracts, these primary contractors act as a “construction manager at risk”, furnishing a bond for the large contract, and managing the paper work flow up through the Corps of Engineers or FEMA. The other contractors, particularly the Louisiana-based firms, were relegated as subs at lower tiers, and the lower the tier the lower opportunity for any profit margin. Some have been forced to turn away from the work, knowing that it would cause negative cash flow because of the vertical tiers, not to speak of widespread reports of slow, or no pay. Others still struggle to get any work at all. This is an absolute irony as these very businesses, most of them small businesses, that are most familiar with the area as well as the needs of local and state government, and that were supposed to be assisted through this program, were in fact not placed in roles that were meaningful, and able to be profitable.

FEMA has also recently announced that they will not be re-bidding the “no-bid” contracts that currently are in place as they had promised. Additionally many proposals solicited by the Corps of Engineers that were directed at local business and small business have not been awarded to date (such as demolition contracts) and some are not going to be awarded at all. Much of the work in these proposals is being conducted under the original large contracts to the prime contractors. These actions by FEMA and Corp of Engineers continue to harm local contractors, local rebuilding efforts, and the rebuilding of our local economy.

In an effort to help resolve some of these issues, it is the recommendation of the LAGC that FEMA, the Corps of Engineers, and state and local government give strong consideration to use of the project delivery method – construction management at risk, but with a variation. Under this method , the Corps will maintain a contract with the CM at-Risk or primary contractor, as a professional service. The CM at-Risk is to provide essential pre-construction services, hold the trade contracts, take responsibility for the work, and guarantee the construction costs and schedule.

Strong consideration should be given to breaking those large contracts into smaller segments to afford more competition, and should be publicly bid. FEMA and the Corps should also consider requiring the CM at Risk to break the contracts up into smaller values and to bid the contracts out publicly, based on the local area’s (parish and municipal) needs. Payment/performance bonds should still be provided by the “primary” contractors, as is the current practice.

The Corps, or if the state or local government chooses to contract directly, should require that the primary contractors or CM’s At Risk who are tasked with “management” of the project, also be tasked with subcontracting debris removal/demolition on a horizontal basis, rather than the

current vertical basis. Zones can be created by the primary contractor, and bid out sufficient to ensure use of open competition and thereby, the use of Louisiana-based, or disaster-area based contractors, large and small. Not only would competition, opportunities, and cost-effectiveness be enhanced, more expedient payment of subcontractors on one-tier would also be improved, and the performance bond would apply to all in those instances were the primary contractor is not paying his bills.

The system we are recommending, certainly, could be no worse than that currently in place, and in fact may prove to be superior in expediting the timely removal of debris, orderly management of work, timely payment of subcontractors, and opportunities for Louisiana companies, not to speak of avoidance of much of the waste observed by many.

Again, thank you for your help in these incredible times. Thank you for your consideration. I'll be happy to attempt to expand on any of my comments, or answer any questions.

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